

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 04 January 2007**

**CASE NO.:** 2006-LHC-00046

**OWCP NO.:** 01-162019

In the Matter of

**O. P.**<sup>1</sup>

Claimant

v.

**BATH IRON WORKS CORPORATION**

Employer/Self-Insured

and

**ONE BEACON INSURANCE COMPANY,  
LIBERTY MUTUAL INSURANCE COMPANY, AND  
AIG CLAIM SERVICE/BIRMINGHAM FIRE INSURANCE**

Insurance Carriers

and

**DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS**<sup>2</sup>

Party-in-Interest

*Appearances:*

Marcia J. Cleveland and Lisa M. Thomas (Marcia J. Cleveland, LLC), Topsham, Maine, for the Claimant

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<sup>1</sup> In accordance with the Claimant Name Policy, which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant's initials in published decisions in lieu of the claimant's full name. See Mem. from John M. Vittone, CJ, Claimant Name Policy (July 3, 2006) available at [http://www.oalj.dol.gov/PUBLIC/RULES\\_OF\\_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT\\_NAME\\_POLICY\\_PUBLIC\\_ANNOUNCEMENT.PDF](http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF).

<sup>2</sup> The Director, OWCP, who is an interested party in view of a request for liability relief pursuant to 33 U.S.C. § 908(f), did not appear at the hearing and has not participated in the proceedings on this claim before the Office of Administrative Law Judges. See Administrative Law Judge Exhibit 11 (Letter from the Office of the Regional Solicitor of Labor dated January 13, 2006, stating that the Director did not wish to participate in the case).

Stephen Hessert (Norman, Hanson & DeTroy),  
Portland, Maine for the Employer/Self-Insured

Richard van Antwerp (Robinson, Kreiger & McCallum),  
Portland, Maine for One Beacon Insurance Company

Dana Gillespie Herzer (Law Offices of Frederick C. Moore),  
Portland, Maine, for Liberty Mutual Insurance Company

Nelson J. Larkins (Preti, Flaherty, Beliveau, Pachios & Haley),  
Portland, Maine, for AIG Claim Service/Birmingham Fire Insurance

*Before:* Daniel F. Sutton,  
Administrative Law Judge

## **DECISION AND ORDER AWARDING BENEFITS AND SPECIAL FUND RELIEF**

### **I. Statement of the Case**

The Claimant, a shipyard worker, brings this claim under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the "LHWCA") for worker's compensation benefits based on a hearing loss allegedly caused in part by his exposure to injurious industrial noise during the course of his employment at the Bath Iron Works Corporation ("BIW"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the District Director referred the matter to the Office of Administrative Law Judges ("OALJ") for a formal hearing pursuant to section 19(d) of the LHWCA.

The hearing was convened in Portland, Maine on February 15, 2006, at which time appearances were made on behalf of the Claimant, BIW and three insurance companies which provided workers' compensation liability insurance to BIW during portions of the Claimant's employment. At the hearing, BIW conceded that it is the responsible party in its capacity as a self-insurer should any benefits be awarded to the Claimant, and the three insurance companies were dismissed as parties to the claim. Hearing Transcript at 17-18. No testimony was taken at the hearing, but documentary evidence was admitted as Claimant Exhibits ("CX") 1-7 and Employer Exhibits ("EX") 1-25. *Id.* at 13-15.<sup>3</sup> The hearing was closed on February 15, 2006, and the record was held open for post-hearing briefs or position papers which have been received from the Claimant and BIW. Accordingly, the record is now closed.

After careful analysis of the evidence contained in the record and the parties' arguments, I conclude that the Claimant is entitled to an award of permanent partial disability compensation for a 47.2 percent permanent binaural occupational hearing loss, as well as medical care, interest

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<sup>3</sup> The Claimant's testimony and the testimony of a medical expert were taken prior to the hearing, and the deposition transcripts were entered into evidence.

and attorney's fees. I further find that BIW is entitled to liability relief from the Special Fund because it has shown that it continued to employ the Claimant after discovering that the Claimant had sustained a work-related hearing loss. My findings of fact and conclusions of law are set forth below.

## **II. The Claim, Stipulations and Issues Presented**

The Claimant seeks permanent partial disability compensation, based on an average weekly wage of \$776.03 per week, for a 47.2 percent binaural hearing loss which he alleges was caused by exposure to injurious noise in and during the course of his employment at BIW. Claimant's Brief at 1.

At the hearing, the Claimant and BIW entered into the following stipulations: (1) BIW has been self-insured for workers' compensation liability since September 1, 1988; (2) One Beacon Insurance Company insured BIW for workers' compensation liability from 1963 through February 28, 1981; (3) Liberty Mutual Insurance Company provided coverage from March 1, 1981 through August 31, 1986; (4) AIG Claims Service/Birmingham Fire Insurance Company provided coverage from September 1, 1986 through August 31, 1988; (5) there has been an employer-employee relationship between BIW and the Claimant at all times reflected in his personnel record which is in evidence, and the Claimant continues to be an employee of BIW; (6) the claim comes within the jurisdiction of the LHWCA; (7) the claim was timely filed and timely controverted; and (8) BIW is the responsible party as a self-insurer in the event that benefits are awarded. Hearing Transcript at 16-17. The Claimant and BIW further agreed at the hearing that the unresolved issues presented for adjudication are: (1) whether the Claimant sustained an injury; (2) the nature and extent of the Claimant's hearing loss; (3) the Claimant's average weekly wage; and (4) whether BIW is entitled to liability relief pursuant to section 8(f) of the LHWCA. *Id.* BIW has only addressed the issue of section 8(f) relief in its post-hearing brief, though it has not formally conceded the other issues identified at the hearing. It does, however, state that the Claimant is entitled to an award for a 47.2 percent binaural hearing loss. BIW Brief at 4.

## **III. Findings of Fact and Conclusions of Law**

### **A. Employment History, Noise Exposure and Hearing Loss**

The Claimant was hired by BIW as a welder in 1967. CX 2 at 13. For his first 20 years at BIW, the Claimant worked as a welder, and he has worked in a tool crib since 1987. CX 7 at 66 (Dep. Trans. pg. 4). During the first 20 years, he was exposed to loud noise from chipping, grinding and gouging while working as a welder, and he did not wear any hearing protection until 1981 or 1982. *Id.* at 67 (Dep. Trans. pg. 5). Although use of hearing protection is mandated in the work areas surrounding the Claimant's tool crib, it is not required in the tool crib itself, and the Claimant testified that he does not wear hearing protection in the tool crib so that he can hear employees ordering tools. *Id.* at 70 (Dep. Trans. pg. 19). Thus, he is regularly exposed to loud workplace noise when he opens the window in the tool crib to dispense tools. *Id.* at 69 (Dep. Trans. pg. 14).

At the time that he was hired by BIW in 1967, the Claimant was given an audiogram which showed some abnormality at 3000 Hz but no measurable hearing loss. EX 23 at 5-6. However, subsequent testing showed that by 1988, the Claimant had developed a 26.6 percent binaural hearing loss. *Id.* at 7. The Claimant's hearing continued to deteriorate, and the most recent audiogram, which was performed on March 21, 2005, showed that he has a 47.2 percent binaural loss. *Id.* Peter J. Houghwout, M.D., a board-certified otolaryngologist, attributed this loss, in part, to the Claimant's noise exposure at BIW. *Id.* at 7-8. There is no contrary evidence.

## B. Hearing Injury, Causation and Extent of Loss

Section 2(2) of the Act defines an injury as an accidental injury arising out of or in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally and unavoidably results from such accidental injury. 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that a claim comes within its provisions. 33 U.S.C. § 920(a). The Section 20(a) presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). To invoke the presumption, the Supreme Court has held that there must be a *prima facie* claim for compensation, to which the statutory presumption refers; that is, a claim "must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Indus./Fed. Sheet Metal, Inc., et al., v. Director, OWCP*, 455 U.S. 608, 615 (1982). A claimant presents a *prima facie* case by establishing (1) that he or she sustained physical harm or pain and (2) that an accident occurred in the course of employment, or conditions existed at work, which **could have** caused the harm or pain. *Bath Iron Works v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999) (*Brown*), citing *Ramey v. Stevedoring Serv. of Am.*, 134 F.3d 954, 959 (9th Cir.1998) and *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149, 151 (1986) (*Susoeff*) (emphasis added); *Kelaita v. Triple A. Machine Shop*, 13 BRBS 326, 330-31 (1981). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Indep. Stevedore Co. v. O'Leary*, 357 F.2d 812, 815 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85, 86 (1986).

On this record, the Claimant has shown that he suffered a hearing loss and that he has been exposed to loud industrial noise in the workplace, some without any hearing protection, over the course of his employment at BIW. In addition, Dr. Houghwout has testified that it is his opinion that at least some of the loss was caused by noise exposure. This clearly constitutes a *prima facie* case of a compensable injury and invokes the statutory presumption. *Brown*, 194 F.3d at 4-5. Since the Claimant has made out a *prima facie* case, the burden shifts to BIW, as the party opposing entitlement, to "rebut the presumption with substantial evidence that the [hearing loss] . . . was not caused or aggravated by his employment." *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997). Rebuttal is accomplished "by showing that exposure to injurious stimuli did not cause the harm" or "that [the Claimant] was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer." *Brown*, 194 F.3d at 5, quoting *Avondale Indus. Inc. v. Director, OWCP*, 977 F.2d 186, 190 (5th Cir.1992) (quoting *Susoeff*, 19 BRBS at 151) (internal quotation marks omitted). BIW has offered no such

evidence, and it has not even attempted to argue against compensability in its brief. Therefore, I find that the Claimant has established that he has a compensable 47.2 percent binaural hearing loss.

### C. Compensation and Benefit Entitlement

Section 8(c)(13) of the LHWCA provides for compensation at a rate equal to two-thirds of an employee's average weekly wage for a maximum of 200 weeks in cases of permanent partial disability resulting from hearing loss. 33 U.S.C. § 908(c)(13). Based on the Claimant's work-related binaural hearing loss of 47.2 percent, I find that he is entitled to an award of 94.4 weeks of compensation. *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234, 237 n.4 (1988). This compensation is payable at the rate of \$517.35 per week, which is equal to two-thirds of the Claimant's average weekly wage of \$776.03.<sup>4</sup>

The first installment of compensation under the LHWCA becomes due fourteen days after a claimant gives notice to the employer of an injury or the employer has knowledge of the injury. 33 U.S.C. § 914(b). The Claimant gave notice to BIW and filed his claim for hearing loss on April 18, 2005. EX 1, 2. Since compensation payments were not timely made, I find that the Claimant is entitled to an award of prejudgment interest. *See Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir.1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). *See also Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F.2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991). The interest shall be assessed as of the date the Claimant's compensation became due (*i.e.*, beginning on the fourteenth day after he filed his claim); *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 907-908 (5th Cir. 1997); and the appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director.

In addition to compensation, BIW is responsible under section 7 of the LHWCA for providing the Claimant with reasonable and necessary medical care for his work-related hearing loss. *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163, 165-166 (5th Cir. 1993).

### D. Special Fund Relief

BIW seeks relief from its liability for the Claimant's compensation pursuant to the Special Fund provisions of section 8(f) of the LHWCA which limits an employer's liability when an employee who is already partially disabled suffers a subsequent work-related injury, and the preexisting condition contributes to a greater level of permanent disability. *General Dynamics Corp. v. Sacchetti*, 681 F.2d 37, 39-40 (1st Cir.1982). Under section 8(f), as amended in 1984, an employer who retains an employee after discovering through the administration of an audiogram that the employee has sustained a hearing loss is entitled to relief from liability for any subsequent worsening of the employee's hearing loss. *Risch v. Gen. Dynamics Corp.*, 22 BRBS 251, 255-56 (1989). The employer's liability in such cases is limited to the lesser of 104

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<sup>4</sup> I adopt the Claimant's proposed average weekly wage of \$776.03, which is calculated under section 10(a) of the LHWCA from BIW's payroll records covering the 52-week period preceding the date of injury, noting the absence of any contrary argument or evidence from BIW. *See* Claimant's Brief at 9-13.

weeks or the extent of hearing loss attributable to the subsequent injury. *Balzer v. General Dynamics Corp.*, 22 BRBS 447 (1989), *aff'd on recon. en banc*, 23 BRBS 241 (1990); *Machado v. General Dynamics Corp.*, 22 BRBS 176, 182 (1989).

BIW asserts that its compensation liability should be limited to the additional 1.6 percent hearing loss that the Claimant suffered between 1997, when a BIW audiogram showed a 45.6 percent binaural loss, and March 21, 2005 when the Claimant's most recent audiogram showed a 47.2 percent loss. BIW Brief at 4. BIW notes that the 45.6 percent loss in 1997 was manifest because the audiogram was conducted by the BIW Industrial Health Department, that the audiogram was performed by a certified individual on a properly calibrated machine, and that the results of the 1997 audiogram are presumptively valid under 20 C.F.R. § 702.441 in the absence of any competing audiogram within six months. *Id.* The Director has not participated in the case or taken any position on BIW's section 8(f) application. *See* Administrative Law Judge Exhibits 1 and 11. Since the uncontradicted evidence shows that BIW retained the Claimant in employment after a pre-existing hearing loss of 45.6 percent was made manifest by the 1997 audiogram, and since the Claimant thereafter sustained additional work-related hearing loss of 1.6 percent, section 8(f) operates to limit BIW's compensation liability to the lesser of 104 weeks of compensation or the extent of the loss attributable to the subsequent injury. As discussed above, the Claimant's 47.2 percent binaural hearing loss entitles him to 94.4 weeks of compensation pursuant to section 8(c)(13) of the LHWCA. The pre-existing portion of this loss, 45.6 percent, equates to 91.2 weeks of compensation. Therefore, BIW's liability is limited by section 8(f) to 3.2 weeks of compensation, the amount attributable to the subsequent hearing loss, and the Special Fund is liable for 91.2 weeks of compensation, the amount attributable to the pre-existing loss. Pursuant to section 8(f)(2)(A) of the LHWCA, the Special Fund's payments shall commence after cessation of payments by BIW. 33 U.S.C. § 908(f)(2)(A).

#### D. Attorney's Fees

Having successfully established his right to compensation and medical benefits through the services of an attorney, the Claimant is entitled to an award of attorney's fees under section 28 of the LHWCA. *See Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). The Claimant's attorney, Marcia J. Cleveland, has filed an itemized application for attorney's fees and costs in the amounts of \$6,232.50 and \$240.60, respectively, for a total of \$6,473.10. BIW objects to the \$225.00 hourly rate at which the Attorney Cleveland has billed her services, and it cites *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006) (affirming ALJ's reduction of the requested hourly rate from \$215.00 to \$200.00 for work performed during 2002 by a Chicago lawyer on a case heard in Madison, Wisconsin) as support for the proposition that \$225.00 per hour is excessive for a simple case tried in Maine. Attorney Cleveland responds that the facts of the cited case are distinguishable in that the attorney in *Baumler* had raised his billing rate twice during 2002, while her increase to \$225.00 per hour in January of 2005 represented her first increase since June of 1998. She also states that her clients in non-contingent environmental litigation currently pay for her services at \$225.00 per hour, that she has been practicing law and litigating for 35 years, and that her \$225.00 hourly rate is less than the \$250.00 rate billed for mediation services by a partner in the firm representing BIW who has less than 35 years experience. BIW's argument that Attorney Cleveland's \$225.00 billing rate is excessive has previously been fully considered and rejected by this ALJ who found that Attorney Cleveland

established that her usual billing rate of \$225.00 as of January 1, 2005 is reasonable and not inconsistent with the customary rate billed by attorneys with comparable experience in Maine. I have also noted that the Board affirmed an award of fees to an attorney with less experience than Attorney Cleveland based on an hourly billing rate of \$220.00). *See Parks v. Naval Personnel Command/MWR*, BRB No. 04-0179 (Oct. 27, 2004) (unpublished), slip op. at 13. The only new information presented by BIW is the *Baumler* case which is distinguishable from the instant case and which does not compel the conclusion that Attorney Cleveland's billing rate is excessive simply because it is higher than the rate approved for work performed three years earlier by a Chicago lawyer. Accordingly, BIW's objection is denied. Upon review, I find that Attorney Cleveland's fee application complies with the requirements of 20 C.F.R. § 702.132(a) and that the fees and costs requested are reasonably commensurate with the necessary work done, taking into account the quality of representation, the complexity of the legal issues involved and the amount of benefits awarded. Therefore, EBC will be ordered to pay Attorney Cleveland fees and costs in the total amount of \$6,473.10.<sup>5</sup>

### III. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following compensation order is entered:

1. The Bath Iron Works Corporation shall pay to the Claimant permanent partial disability benefits for his hearing loss for a period of **3.2** weeks at the rate of **\$517.35** per week, commencing as of May 2, 2005;
2. Upon completion of the compensation payments by the Bath Iron Works Corporation, the Special Fund shall pay to the Claimant permanent partial disability benefits for his hearing loss for a period of **91.2** weeks at the rate of **\$517.35** per week;
3. The Bath Iron Works Corporation and the Special Fund shall pay to the Claimant interest on all past due compensation benefits at the rate provided by 28 U.S.C. § 1961 (2003), computed from the date each payment was originally due until paid, and the applicable rate shall be determined as of the filing date of this Decision and Order with the District Director;
4. The Bath Iron Works Corporation shall provide the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related hearing loss may require;
5. The Bath Iron Works Corporation shall pay attorney's fees and costs in the amount of **\$6,473.10** to the Claimant's attorney, Marcia J. Cleveland, LLC;
6. One Beacon Insurance Company (f/k/a Commercial Union Insurance Company), Liberty Mutual Insurance Company and AIG Claim Service/Birmingham Fire Insurance

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<sup>5</sup> This Order is neither enforceable nor payable until such time as an award of benefits becomes final, and that award reflects a successful prosecution of the claim. *See Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663 (7th Cir. 1982); *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986).

Company are dismissed as parties to the claim for benefits based on occupational hearing loss;  
and

7. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

**SO ORDERED.**

**A**

**DANIEL F. SUTTON**  
Administrative Law Judge

Boston, Massachusetts